No. 75-1462.

IN THE

Supreme Court of the United States

DELAWARE REPUBLICAN STATE COMMITTEE, et al.,
Petitioners,

v.

B. WILSON REDFEARN, et al.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

WILLIAM O. LAMOTTE, III,
THOMAS REED HUNT, JR.,
WILLIAM T. ALLEN,
MORRIS, NICHOLS, ARSHT & TUNNELL,
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Counsel for Respondents.

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BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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COUNTERSTATEMENT OF QUESTIONS PRESENTED.

1. Whether this Court should decide issues neither presented to nor decided by the Court of Appeals below.

2. Whether this case presents justiciable issues.

3. Whether the District Court properly applied the one person-one vote principle of *Baker v. Carr* to the process whereby the Delaware Republican Party nominates the Republican candidate for each state-wide and national political office.

COUNTERSTATEMENT OF THE CASE.

Seeking a fair voice in the selection of the Republican nominees for state-wide and national public office, respondents (appellees below) brought this action individually and on behalf of all registered Republicans in the Second Republican Convention District of the State of Delaware. The Second District is one of four geographical convention districts into which the Delaware State Republican Party years ago divided the State of Delaware, and it has become by far the largest convention district in terms of general population, registered Republican party members, and historical Republican vote at the polls.

Respondents sought relief from an entrenched state convention delegate allocation system, which gave each Republican in other convention districts nearly three times the voting power of a Republican residing in the Second District in nominating Republican candidates for state-wide and national office and nearly six times such voting power in selecting Delaware's delegates to the Republican National Convention.

The Republican Party of the State of Delaware selects its nominees for state-wide and national office through the mechanism of a party convention.[1] Prior to a change in the party rules that followed the judgment of the District Court herein, the selection of delegates to the nominating convention was dictated by a rule of the Republican State Committee requiring, in relevant part, that 55% of the total delegates be distributed equally among the four convention districts. Similarly, the prevailing practice with respect to election of Delaware's delegates to the Republican National Convention was to allocate 100% of such delegates

1. Subject only to a possible primary between the convention winner and the convention runner-up if the runner-up receives on the final polled vote at least 35% of the convention delegate vote. 15 *Del. C.* 1953, § 3116 [now 15 *Del. C.* 1974, § 3113].

equally among the four convention districts. Since the convention districts vary dramatically in terms of population, registered Republicans, and historical Republican votes cast, these requirements resulted, as the District Court found, in gross distortions in voting power among similarly-situated Republicans throughout the state. The fact of such inequality in voting power has never been in dispute in this case.

The District Court, relying substantially upon the rationale of this Court's decision in *Gray v. Sanders,* 372 U. S. 368 (1963), initially granted summary judgment for respondents and affirmatively ordered the Republican party to refrain from allocating delegates on the challenged basis and further ordered the party to effect a constitutionally tolerable allocation formula. *Redfearn v. Delaware Republican State Committee,* 362 F. Supp. 65 (D. Del. 1973).

Petitioners appealed to the Third Circuit Court of Appeals, arguing, among other things, that the discrimination practiced against registered Republicans living in the Second District was protected first amendment activity and that the questions presented in the case were non-justiciable. However, the Court of Appeals did not reach the merits; it *held* simply that, since the relief requested included injunctive relief, a statutory three-judge court was required, and that, therefore, the District Court had had no jurisdiction in the matter. Judge Gibbons and Judge Aldisert came to this conclusion for different reasons as set forth in separate opinions. Judge Rosenn, who would have reached the merits, filed a dissenting opinion. *Redfearn v. Delaware Republican State Committee,* 502 F. 2d 1123 (3d Cir. 1974).

On remand, respondents eliminated the jurisdictional infirmity by withdrawing their request for injunctive relief.

Concluding that the holding of the appellate panel was only that a statutory three-judge court had been required in order to grant the relief originally sought, Chief Judge Latchum reinstated the declarative portions of his former judgment. *Redfearn v. Delaware Republican State Committee*, 393 F. Supp. 372, 374-75 (D. Del. 1975).[2] Although not bound by the mandate to speak to issues raised by only one of the three appellate judges, the District Court, in commendable deference, elected to do so with respect to an issue raised only by Judge Gibbons.[3]

The focus of the comments of the District Court was upon a basic premise underlying the thesis of Judge Gibbons. Judge Gibbons was of the belief that, if certain provisions of the Delaware election laws were struck down as unconstitutional,[4] then a superseded section of the prior Delaware election laws would, he believed, become operative,[5] and he read that section as giving any Republican aspirant the right to initiate a direct primary regardless of the action taken at the nominating convention. 502 F. 2d at 1126. In effect, Judge Gibbons was suggesting, as an "alternative" to requiring, as the District Court had done, that the convention delegates be properly apportioned, that the nominating convention be deprived of the legal power to finally select the party nominee. Judge Gibbons

2. The judgment is set forth in Respondents' Appendix 1a.

3. "Nevertheless, while this Court may not be bound to consider the issue raised by Judge Gibbons since it was not a matter upon which a majority of the division agreed and consequently was not within the compass of the mandate, this Court appears to be free to consider that issue as a matter of discretion. [Citation omitted]." 393 F. Supp. at 375.

4. The laws which Judge Gibbons would strike provide that access to the general election ballot is through nomination at a party convention, except that a runner-up candidate who receives at least 35% of the convention delegate votes has a right to have a run-off direct primary. 15 *Del. C.* 1953 §§ 3116 and 3301(c) [now §§ 3313 and 3301(e)(1)]; Respondents' Appendix 3a-4a.

5. 15 Del. C. 1953 § 3107; Respondents' Appendix 4a.

was careful to state that he was not insisting upon this alternative but merely that it should have been *considered* as a possibility, 502 F. 2d at 1128, which was the basis upon which he ruled that a statutory three-judge panel was required. *Id.* at 1128-29.[6]

It is clear from his opinion that the viability of Judge Gibbons' suggested "alternative" turned on his understanding of the manner in which the prior election law operated. In a carefully reasoned and documented treatment of that issue, the District Court on remand ruled that the prior Delaware election law in fact did not bestow a right upon any aspirant for state-wide and national office to a direct primary election, and that, therefore, to declare Sections 3116 and 3301(c) unconstitutional would not have the effect anticipated by Judge Gibbons. 393 F. Supp. at 378. Moreover, since neither the present nor former election laws spoke at all to election by primary of Delaware's delegates to the Republican National Convention, no amount of destruction of the current laws would have provided an alternative to convention delegate apportionment with regard to this aspect of the case. *Id.* at 378.

Petitioners again appealed. But, significantly, *they did not ask the Court of Appeals to pass upon the merits of the decision of the District Court.* The appeal focused very narrowly on the question of whether Judge Gibbons' interpretation of the prior Delaware election law was binding upon the District Court and whether the District Court had been required by the mandate to conclude that its initial decision could not be reinstated. In short, peti-

6. Judge Aldisert adopted none of this reasoning. He based his finding that a three-judge panel was compelled on the ground that the challenged Republican party rule itself had "the efficacy of an administrative regulation". 502 F. 2d at 1129. The petition for certiorari constantly refers to the "opinion of the court" where the subject matter being discussed clearly relates only to views of Judge Gibbons.

tioners directed their appeal to the issue of whether the District Court had failed to obey the mandate of the Court of Appeals. As stated in petitioners' "Designation of Issues Presented" [7], the only issues tendered to the Court of Appeals for consideration were:

> "1. Did the majority of the sitting panel of the Circuit Court of Appeals find that the initial decision of the District Court intruded upon defendants' First Amendment right of association?
>
> "2. May the District Court, on remand, substitute its own interpretation of the questioned statutes, for that given by the Court of Appeals, thereby attempting to avoid the mandate of the Court of Appeals?" [8]

Judge Aldisert sat on the panel that heard this second appeal, and he rendered the judgment of the court, which spoke directly to the issues presented:

> ". . . [T]he court having concluded that the majority members of the court at 502 F. 2d 1123 agreed only that a challenge to the internal rules of the Republican State Committee of Delaware for the allocation of delegate seats in that party's state convention which challenge requested injunctive relief thereby requiring the convening of a three-judge court, and this court recognizing that neither Judge Gibbons nor Judge Aldisert reached the merits of the controversy, it is
>
> ADJUDGED AND ORDERED that the judgment of the district court be and the same is hereby affirmed." [9]

7. See Fed. R. App. P. 30(b).
8. Respondents' Appendix 5a.
9. Petitioners' Appendix 1a.

Petitioners are therefore wrong in asserting here that the judgment order of the Court of Appeals conflicts with the opinion of the first panel or with a decision of any other court of appeals. The issues which petitioners here claim require the immediate consideration of this Court were not presented to the Court of Appeals. That court did not reach the merits for the simple reason that it was not asked to do so.

ARGUMENT.

I. This Case Does Not Evidence a Split in Opinion Between the Third Circuit Court of Appeals and Any Other Circuit Court of Appeals.

Thirteen years ago this Court explicitly left open the question of the applicability of the one person-one vote principle announced in *Baker v. Carr* to a state nominating convention. *Gray v. Sanders*, 372 U. S. 368 (1963). Petitioners now ask the Court to address this issue in a case devoid of the aid which normally would be supplied by a decision by the Court of Appeals on the merits of the contentions they advance.

It has long been the practice of the Supreme Court to avoid deciding issues which the court below was neither asked to decide nor did decide. *E.g., Duignan v. United States*, 274 U. S. 195 (1927) and cases cited at p. 200. At trial in *Duignan*, an action seeking, among other things, to have a lease forfeited under Section 23 of the National Prohibition Act, defendant "drew in question the constitutionality of the forfeiture of his leasehold as a denial of due process of law." 274 U. S. at 197. The district court granted the relief sought by the complaint, and the court of appeals affirmed. On appeal this Court affirmed the decree but refused to pass upon the constitutional issue which appellant sought to tender:

> "We do not consider the constitutionality of the forfeiture under § 23. The court below enumerating the questions raised and presented made no mention of the constitutional question. The assignment of errors below did not refer specifically to it as required by the rules of that court, and so far as the record discloses, it was not presented there. See United States v. Jaffney (C. C. A. 2d) 10 F. (2d) 694, 696. This court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed."
>
> *Duignan v. United States, supra* at 200.

More recently, in *Adickes v. Kress & Co.*, 398 U. S. 144 (1970), plaintiff, asserting a civil rights claim, sought to have this Court review the district court's denial of her motion to amend her complaint but failed to press the point before the court of appeals. This Court refused to consider the question:

> "Although in our certiorari petition, petitioner challenged this ruling, and asked this Court to review this statute by overruling the holding the the Civil Rights Cases, 109 U. S. 3 (1883), examination of the record shows that petitioner never raised any issue concerning the 1875 statute before the Court of Appeals. Accordingly, the Second Circuit did not rule on these contentions. Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."
>
> *Adickes v. Kress & Co., supra* at 147 n. 2.

Accord, Lawn v. United States, 355 U. S. 339, 362-363 n. 16 (1958); *Husty v. United States*, 282 U. S. 694, 701-02 (1932). Nothing herein suffices as a compelling reason to avoid this established rule.

II. The Issues Raised By the Complaint Are Justiciable.

Petitioners' contention that this case presents non-justiciable issues does not withstand analysis in light of the teachings of *Baker v. Carr*, 369 U. S. 186 (1962).

While a major political party is a "political" creature for many purposes, nonetheless, certain of its actions done under color of state law do present an appropriate opportunity for the exercise of federal judicial power. *Smith Allwright,* 321 U. S. 649 (1944); *Terry v. Adams,* 345 U. S. 461 (1953); *Gray v. Sanders,* 372 U. S. 368 (1963).[10]

The standards for determining if a particular issue presents a non-justiciable "political question" were articulated by this Court in *Baker v. Carr:*

> ". . . Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.
>
> "Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence. . . ."
>
> *Baker v. Carr, supra* at 217.

10. While *Smith* and *Terry* were decided under the fifteenth and not the fourteenth amendment, petitioners have cited no opinion of this Court, and we have found none, indicating that the degree of state involvement necessary to find state action under the fourteenth amendment and thereby confer jurisdiction on a federal court, differs from that necessary under the fifteenth amendment.

All of these standards are extricable from the case at bar. Petitioners assert no "textually demonstrable constitutional commitment of the issues to a coordinate political department", and there is none. Nor is there a lack of judicially discoverable and manageable standards for resolving the question presented below. As this Court stated, in *Baker v. Carr:*

> ". . . The question here is the consistency of state action with the Federal Constitution. . . . Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action."
>
> *Baker v. Carr, supra* at 226.

And, in light of this Court's holding in *Gray v. Sanders, supra,* it is settled that when a major political party, found in a particular context to be cloaked with the mantel of state action, exercises an electorial function, the safeguards of the equal protection clause affect the range of policy choices available to it. In such a context, the "initial policy determination" has been made by the fourteenth amendment. *Baker v. Carr, supra; Gray v. Sanders, supra.*

The issues here presented are no less justiciable under the remaining *Baker v. Carr* formulations. There is no threat of a judgment expressing lack of respect for a coordinate branch of government, no unusual need for unquestioning adherence to a political decision, and no threat of differing pronouncements from various governmental departments.

Under these tests it seems plain that the complaint here presented a justiciable, "non-political" question over which the District Court correctly exercised its jurisdiction.

III. The District Court Protected Petitioners' First Amendment Rights and Confined Itself Only to Discrimination That Substantially Diminished Voting Rights.

In Delaware, as elsewhere, the Republican Party is in large measure a private association. Its intra-party rules, deliberations, policies, and activities are not fit topics for judicial deliberation. The District Court was well aware of this, 362 F. Supp. at 73, and focused its decision narrowly upon the specific aspects of the Republican Party's nominating activities that directly and substantially affected the practical value of the exercise of the right to vote.[11]

Insofar as the Delaware Republican Party has, through statute, rule, and custom, come to exercise the power to select by convention the nominees for state-wide and national office, and thus eliminate or drastically narrow the

11. Notwithstanding petitioners' repeated broad references to interference by the District Court with "internal political deliberations", the declaratory judgment of the District Court (Respondents' Appendix 1a) relates only to the manner of selecting delegates to Republican state *nominating* conventions at which the Republican nominees for state-wide and national office are selected. These are held bi-annually. The odd-year Republican state conventions and all other aspects of party organization, procedure, management, and activity remain completely unaffected by the judgment.

Moreover, the District Court's sensitivity to petitioners' first amendment rights was evident even during the dispute between the parties over the proper scope of injunctive relief when, prior to the first appeal and remand, that was still an issue in the case. See, for example, the Order Denying Plaintiffs' Motion for Reargument, August 13, 1973, in which the court declined to dictate the allocation of delegates, leaving this to the party and requiring only that "the result bear a reasonable relationship to the concept of equal representation of 'potential party members'" (Respondents' Appendix 7a).

range of Republican choices available to the electorate, it is performing a function not wholly private. In this captive electorial function the party is constrained by certain guarantees of the Constitution. It seems plain, for example, that a major political party could, as a matter of deliberation and policy, endorse the repeal of the thirteenth amendment and that no judicial review of that decision would properly be available. But it is equally clear that such a party could not restrict access to its primary ballot racially, and, if it attempted to do so, federal courts could provide a remedy. *Smith v. Allwright, supra.* Discrimination which affects voting rights and is based upon the place where one happens to live is no less invidious. In *Gray v. Sanders,* this Court stated:

> ". . . [T]here is no indication in the Constitution that homesite . . . affords a permissible basis for distinguishing between qualified voters within the State." 372 U. S. at 380.

The delegate apportionment scheme here impairs the right to vote by denying to respondents an equal starting place in the competition for selection of the party's nominees. As in *Baker v. Carr,* discrimination here can only continue because the discrimination itself assures that those made favorites by it will retain the power to perpetuate it. The role which the Republican Party plays in Delaware in the nomination and election of state-wide and national public officials is simply too crucial for the federal courts to countenance the sort of gross disparity in voting power between similarly situated individuals that the undisputed facts of this case demonstrate.

The District Court correctly understood the distinction between conduct of a major political party which is protected by the first amendment from governmental inter-

ference and that conduct which, because it impacts so significantly on the effective exercise of the franchise, is subject to judicial review and safeguards of the equal protection clause.

CONCLUSION.

This case presents no decision of the Third Circuit Court of Appeals on the merits of the issues presented by the petition. The Court of Appeals was neither asked to nor did it address these questions. In any case, the District Court's judgment is correct. Therefore, the petition should be denied.

Respectfully submitted,

WILLIAM O. LAMOTTE, III,
THOMAS REED HUNT, JR.,
WILLIAM T. ALLEN,
MORRIS, NICHOLS, ARSHT & TUNNELL,
Twelfth and Market Streets,
Wilmington, Delaware. 19801
Counsel for Respondents.

May 12, 1976.

RESPONDENTS' APPENDIX.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 4528

B. WILSON REDFEARN, JOAN ZIMMERMAN, RICHARD E. COLGATE, FRANCIS A. PAINTIN, DONALD R. KIRTLEY, Individually and on behalf of all other similarly situated,

Plaintiffs,

v.

DELAWARE REPUBLICAN STATE COMMITTEE and HERMAN C. BROWN, Chairman,

Defendants,

BASIL R. BATTAGLIA, RAYMOND T. EVANS, MARY L. SIMS, ALEXANDER DE STEPHANO and JANE BADDORF,

Intervening Defendants,

JAMES H. BAXTER, JR., GEORGE A. BRAMHALL, FLORENCE E. CRAEMER, HARVEY H. LAWSON and WILLIAM D. STEVENSON, SR.,

Intervening Defendants,

CHARLES G. LAMB, EVELYN H. WOOD, ALLEN HEDGECOCK, ALLEN HAAS, ANDREA L. BARROS and JOHN DAVIS,

Intervening Defendants.

JUDGMENT.

The Judgment of this Court entered in this case on August 20, 1973 having been reversed by the Court of Appeals for the Third Circuit on July 24, 1974 and remanded to this court for further proceedings consistent with the opinion of the Court of Appeals (Docket Item 37), and it further appearing that the plaintiffs have withdrawn their demand for injunctive relief (Docket Item 38) so that the case may proceed before this single judge court and further proceedings having been had by this Court, now therefore, for the reasons set forth in this Court's opinions of July 27, 1973, August 13, 1973 and April 2, 1975, respectively, it is hereby

ORDERED, DECLARED AND ADJUDGED that:

1. The formula set forth in existing Rule 2 of the Rules of the Republican State Committee for the allocation of delegates and alternate delegates to the Republican State Nominating Convention is inconsistent with the one-man, one-vote principle and thus violates the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

2. The present and traditional practice of the Republican State Committee of allocating Delaware's delegates and alternate delegates to the Republican National Convention equally among the existing four Republican Convention Districts is also inconsistent with the one-man, one-vote principle and thus violates the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

Dated: April 2, 1975.

JAMES L. LATCHUM,
Chief Judge.

15 Del. C. 1974, § 3113.

Certification of convention nominees for primary election.

The presiding officer and secretary of the convention of any political party shall certify to the several departments of elections, the State Election Commissioner and the Secretary of State the names of all persons receiving at least 35% of the eligible votes cast on the final polled vote in the convention for the nomination of United States Senator, Representative in Congress, Governor and other state offices. The final polled vote shall be when 1 of the nominees for each of the above offices shall have received a vote greater than 50% of the total number of eligible delegate votes at such convention. Such certification shall be made within 5 days of such final vote. When the names of 2 such persons are so certified with respect to any office, a primary election shall be held on the Saturday immediately following the first Monday in September in all districts in which votes may be cast at the general election for that office and in the same manner as elsewhere provided in this title for primary elections, provided that the person receiving the lesser number of votes at the convention with respect to any office, shall, within 5 days of such final vote give notice pursuant to § 3106(a)(1) and (b) of this title. (15 Del. C. 1953, § 3116; 57 Del. Laws, c. 241, § 8; 57 Del. Laws, c. 567; § 18F; 58 Del. Laws, c. 258, § 8.)

15 Del. C. 1974, § 3301(e).

Certificates of nominations.

(e) No candidate for the office of elector of President and Vice-President, United States Senator, Representative in Congress, Governor or other state officer to be voted for on a statewide basis, shall be deemed nominated and no

certificate of nomination for such candidate shall be made or filed, nor shall the name of any such candidate be placed on the ballot in any general election in this State, unless the candidate:

(1) Shall have been so nominated by receiving more than 50% of the eligible delegate vote on the final polled vote of a state nominating convention of the political party advancing his candidacy, at a convention held not later than the fourth Saturday in July in the year of such general election and who was not required to run in a primary; or

(2) Shall have received a majority of the votes cast by registered voters of the political party advancing his candidacy at a statewide primary election held pursuant to the provisions of Chapter 31 of this title.

15 Del. C. 1953 § 3107 (stricken in its entirety by 57 Del. Laws, Ch. 241 (1969)).

Notice by person desiring to be candidate.

Any person desiring to be voted for as a candidate for nomination at any primary election shall notify the County Committee of the political party of which he is a member, in writing at least 15 days before such primary election is to be held.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

—

(D. C. Civil No. 4528)
No. 73-1916

—

B. WILSON REDFEARN, JOAN ZIMMERMAN, RICHARD E. COLGATE, FRANCIS A. PAINTIN, DONALD R. KIRTLEY, Individually and on behalf of all others similarly situated,

Plaintiffs,

v.

DELAWARE REPUBLICAN STATE COMMITTEE, and Chairman, HERMAN C. BROWN,

Defendants,

BASIL R. BATTAGLIA, RAYMOND T. EVANS, MARY L. SIMS, ALEXANDER A. DeSTEPANO, and JANE BADDORD,

Intervening Defendants,

CHARLES G. LAMB, EVELYN H. GREENWOOD, ALLEN HEDGECOCK, ALLEN HAAS, ANDREA L. BARROS, and JOHN DAVIS, Individually and as Officers of the Kent County Republican Committee,

Intervening Defendants,

DELAWARE REPUBLICAN STATE COMMITTEE, et al.,

Appellants.

APPELLANTS' DESIGNATION OF PORTIONS OF THE RECORD ON APPEAL TO BE PRINTED IN APPENDIX AND DESIGNATION OF ISSUES PRESENTED.

COME NOW, the Appellants, and designate the following portions of the record on appeal in the above entitled case to be printed as an Appendix to the briefs, as provided by Rule 30 of the Federal Rules of Appellate Procedure. The numbers used in this Designation refer to the numbers affixed to the documents by the Clerk of the District Court.

47. Opinion of the District Court, Latchum, J.

48. Judgment of the District Court, Latchum, J.

Appellants further state that the issues which they intend to present on appeal are as follows:

1. Did the majority of the sitting panel of Circuit Court of Appeals find that the initial decision of the District Court intruded upon the defendant's First Amendment Right of Association?

2. May the District Court, on remand, substitute its own interpretation of the questioned statutes, for that given by the Court of Appeals, thereby attempting to avoid the mandate of the Court of Appeals?

Please take notice that within ten (10) days of receipt of this Designation, you must serve upon the undersigned a Designation of any additional portions of the record which you deem necessary to include in the Appendix.

BIGGS & BATTAGLIA,
By: /s/ VICTOR F. BATTAGLIA,
Victor F. Battaglia,
1206 Farmers Bank Building,
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Attorney for Appellants.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

—

Civil Action 4528

—

B. WILSON REDFEARN, JOAN ZIMMERMAN, RICHARD E. COLGATE, FRANCIS A. PAINTIN, DONALD R. KIRTLEY, Individually and on behalf of all others similarly situated,
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Intervening Defendants,

CHARLES G. LAMB, EVELYN H. GREENWOOD, ALLEN HEDGECOCK, ALLEN HAAS, ANDREA L. BARROS and JOHN DAVIS,
Intervening Defendants.

ORDER DENYING PLAINTIFFS' MOTION FOR REARGUMENT.

The Court having considered the motion by the plaintiffs, other than Redfearn, for reargument, it is

ORDERED that the said motion is hereby denied.

The Court held in its opinion of July 27, 1973 that the Delaware Republican State Committee's present formula for apportioning delegates to the Republican State and National Conventions failed to comport with the one man, one vote principle and therefore denied equal protection in the nominating process. While the Court left it up to the Republican Party to determine the proper constituency to be equally represented in the nomination process, it did define the outer boundaries of the Party's discretion by suggesting that the one man, one vote principle could be achieved by basing apportionment on total population, on registered Republican voters, or prior Republican voting or some combination of these so long as the result bears a reasonable relationship to the concept of equal representation of "potential party members." The Court is aware that "potential party members" is a theoretical concept not capable of exact measurement. Thus, the Party will be required to use the best available approximation of potential party voters, even if this measure is imperfect and somewhat unequal. See Comment, *Bode v. National Democratic Party*, 85 Harv. L. Rev. 1460, 1468-1476; Note, One Man, One Vote and *Selection of Delegates to National Nomination Convention*, 37 U. Chi. L. Rev. 536, 549-551.

Dated: August 13, 1973.

JAMES L. LATCHUM,
United States District Judge.